

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

74-2380

~~74-2100~~

RECEIVED

In The
United States Court of Appeals
For The Second Circuit

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UNITED STATES OF AMERICA,

Appellee,

- against -

FORREST GERRY, JR.,

Defendant-Appellant.

*On Appeal from the United States District Court for the
Eastern District of New York*

**PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC**

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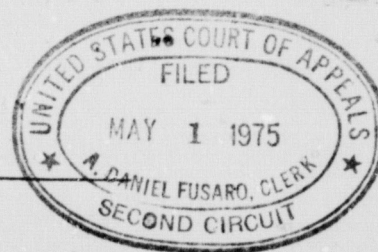


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

Docket No. 74-2380

-against-

FORREST GERRY, JR.,

Appellant.

-----x
PETITION FOR REHEARING
WITH SUGGESTION
FOR REHEARING EN BANC

On April 17, 1975, this Court (Hon. Edward Lumbard, Hon. James L. Oakes, C.C.J., and Hon. John R. Bartels, D.J.) affirmed appellant Gerry's conviction of obstruction of justice and conspiracy to obstruct justice in violation of 18 U.S.C. 1503.

As explained below, the Court's decision was based in significant part on a factual misrepresentation made by the Government during oral argument. Accordingly, fairness requires that this application for rehearing with suggestion for rehearing en banc be granted so that the Court can reconsider the appellant's argument in light of the true facts.

The allegation against Gerry, in essence, was that he and Elden Turcotte, a co-defendant, attempted to persuade David Kraft to tell a false story to a federal grand jury. On appeal the appellant Gerry's first and principal challenge was to the sufficiency of the evidence against him. He claimed that he did not know and did not believe that Kraft, who had previously been arrested for perjury committed before the grand jury, would again be called before that grand jury.

The Court rejected this argument, stating:

"Gerry and Turcotte knew that there was a pending federal grand jury investigation into race fixing and hidden ownership of horses. The transcript of the August 19th conversation establishes beyond any doubt that defendants were fabricating a story about Adios Misty and Milty Hanover to tell an inquiring authority. Defendant's suggestion that the story was to be presented to the New Jersey Racing Commission in the event it investigated Kraft's sons is unpersuasive. At the time of the August 19th meeting, that body was not investigating Kraft Hill Farms, Kraft, Kraft's sons, Gerry, or Turcotte. Moreover, the August 19th meeting appears to have been arranged by Gerry, not by Kraft, and the fabricated story came mainly from Turcotte's lips. Since neither Gerry nor Turcotte had anything to fear from (or even any interest in) a New Jersey investigation, it is difficult to believe that the object of the meeting was to prepare for a New Jersey investigation. On the other hand, the ongoing federal investigation into race fixing which was known to and concerned both Gerry and Turcotte, gave them a motive for fabricating a story for the grand jury.

"While it is true that no explicit reference to the pending grand jury investigation

was made during the taped conversations, we have previously held that circumstantial evidence is sufficient to uphold an obstruction of justice charge. United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). Here the evidence showed that defendants arranged the meeting, took the active role in fabricating a story about the two horses, and knew that a federal grand jury was investigating the ownership of the horses. Since the federal investigation was the only ongoing investigation and since the evidence established motives for the defendants to concoct the cover story, the jury could properly infer that defendants' object was to obstruct the grand jury proceedings in violation of 18 U.S.C. §1503." Slip op. 2963-64 (underscoring added).

It is clear from its opinion that the Court relied heavily on its belief that on August 19, 1973 the New Jersey Racing Commission was not investigating Kraft Hill Farms or Kraft's sons.

This belief resulted from a misrepresentation to that effect by the Government. At oral argument the Court asked the Government attorney whether the New Jersey racing authorities were at that time investigating Kraft Hill Farms or Kraft's sons. The Government attorney replied that they were not. This statement was in error.

At trial Gerry testified that a few days prior to the August 19 meeting Kraft told him that the New Jersey Racing Commission was investigating Kraft Hill Farms (Tr. 948-950).*

* The reference is to the trial transcript.

trial concerning whether or not there was an investigation being conducted by the New Jersey racing authorities at that time.* The Government offered no testimony to show that the New Jersey Racing Commission investigation was non-existent.

In fact, as the Government knew and the Government attorney who argued this appeal should have known, on August 19, 1973 the New Jersey Harness Racing Commission was investigating Kraft Hill Farms and Kraft's sons. On March 14, 1974, in a trial of this case before the Hon. Orrin Judd, D.J., which resulted in a mistrial, Joseph Greenberg, the State Steward for the New Jersey Harness Racing Commission, testified that, after an investigation by the Commission, on September 27, 1973 the licenses of Kraft Hill Farms, and David Kraft's two sons - Ron and Terry - were suspended for hidden ownership of horses (M 912-921, A 1-10).** While the record of that trial does not reveal the date that the New Jersey commission began its investigation, the investigation was commenced well before the actual date of suspension. In fact, the investigation began

* Kraft did testify that his sons' license with the New Jersey racing authorities was suspended, but gave no date (Tr. 330-331).

** "M" here refers to the trial minutes of the earlier trial, "A" refers to the Appendix of this petition.

on August 15, 1973 - four days prior to the meeting among Turcotte, Gerry and Kraft.*

Thus, the New Jersey Racing Commission investigation was not "non-existent" (slip op. 2963, f.n. 9), as the Government led the Court to believe.** In fact, the investigation was in progress at the time of the August 19 meeting.

To allow a decision influenced by a serious misrepresentation of the Government to remain would be a grave injustice. Fairness requires that the Court reconsider its decision in light of the actual facts.

* In a telephone conversation on April 26, 1975, Greenberg told the writer of this brief that the investigation commenced on that date.

** Appellant does not contest the good faith of the Government attorney or contend that he knew that his representation was factually incorrect. However, when a Government attorney makes an unequivocal statement to the Court in order to persuade it to rule favorably for the Government, he must be charged with the knowledge of his associates. Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Ott, 489 F.2d 872, 873-874 (7th Cir. 1973).

CONCLUSION

For the above stated reasons, the Petition should be granted and the opinion of the Court vacated or modified.

Respectfully submitted,

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LAWRENCE S. GOLDMAN,
Of Counsel

are going to get into a whole collateral area.

I expect an offer of proof to avoid the problem, if my anticipation is correct.

THE COURT: What is he going to do, say something about what is on the records of the New Jersey Harness Racing Board or what Mr. Kraft told him?

MR. CASTELLANO: I don't believe anything about what Mr. Kraft told him.

THE COURT: All right. We'll wait until we get the question.

(In open court.)

DIRECT EXAMINATION

BY MR. CASTELLANO:

Q Mr. Greenberg, what is your business or occupation?

A I am a State Steward for the New Jersey Harness Racing Commission.

Q Are you here pursuant to my subpoena?

A Yes, sir.

Q As State Steward of the New Jersey Harness Racing Commission where are you stationed right now?

A Right now I am at Freehold, New Jersey.

Q When Freehold, New Jersey is holding its meet and that meet comes to an end, does harness racing

resume in New Jersey?

A Yes, it does.

Q Where?

A Atlantic City.

Q And then do you go to Atlantic City?

A I do.

Q When Atlantic City's meet ends does the racing go back to Freehold?

A Yes.

Q So you are between those two places?

A Yes, sir.

Q And you are the State Steward?

A Yes, sir.

Q Tell me, Mr. Greenberg, are you familiar with Kraft Hill Farms in New Jersey?

A Yes.

Q Do you know David Kraft?

A Yes, I do.

Q Has his license been suspended by the New Jersey State Harness Commission?

A Yes, it has.

Q Since its suspension did Kraft Hill Farms continue in business?

A Yes, it has.

Q Who operated Kraft Hill Farms after David Kraft's suspension?

A Terry and Ron Kraft.

Q Can you tell us when David Kraft's license was suspended?

A I think it was in 1971.

Q And from the date of that suspension, what does that mean with regard to David Kraft and the activities of harness racing?

A Well, in New Jersey if he is suspended he cannot communicate or have anything to do with the farm.

Q Can he have anything to do with harness horses?

A Nothing at all.

Q Can he have anything to do with the driving?

A Nothing.

Q Can he have anything to do with the purchase or sale of horses?

A No, sir.

Q Actually, can he walk onto Kraft Hill Farms?

A Not supposed to.

THE COURT: Not what?

THE WITNESS: Not supposed to.

Q Now, do you know the persons who later, after David Kraft's suspension, operated Kraft Hill Farms?

A Yes. Ron and Terry.

Q Two sons?

A Two sons.

Q Of David Kraft?

A Of David Kraft.

Q Did there come a time that those licenses were suspended?

A Yes, they were suspended last year.

Q On whose complaint were they suspended?

A On mine.

Q As the State Steward?

A I made recommendation to the Commission.

Q Tell me, Mr. Steward, assume for a moment that I owned a horse and I was licensed in the State of New Jersey and my horse was driving either at Freehold or at Atlantic City and Eldon Turcotte was driving and training my horse, if I objected to that and did not want the horse to be raced and I reported that to you with formal notification, would the horse get stopped from racing?

MR. POLLACK: Objection as to form, your Honor.

THE COURT: Overruled.

A I would stop the horse from racing if I have got a written notice.

Q All I'd have to do is write to you and you would stop the horse from racing, right?

A Upon investigation and verification, yes.

Q How many years have you been in the position that you hold?

A Three years now.

Q Three years. During the course of those three years up until -- when did you say Kraft Hill Farms operated?

A They operated right up until last year.

Q And during the course of that time did they race horses, Kraft Hill Farms, at both Freehold and Atlantic City?

A Yes, they did.

Q Did they have trainers and drivers driving those horses?

A Yes, they did.

(Continued on next page.)

DIRECT EXAMINATION

BY MR. CASTELLANO: (Cont.)

MM:ss
3PM1

Q And having made the complaint against Ron and Terry Kraft, was action taken on your complaint?

folls
BS

A Yes.

Q By the New Jersey, what is it, the State Harness Racing Commission?

A Yes, we have one commission in New Jersey for harness and thoroughbred racing.

Q You what?

A We have one commission in New Jersey for harness and thoroughbreds.

MR. POLLACK: I object to the entire line of questioning on the grounds that I brought out at side bar.

THE COURT: Overruled.

THE CLERK: Six documents marked defendant's exhibit M through R for identification.

Q Now, these exhibits M through R, six exhibits, photostats, are they kept in the regular and ordinary course of your affairs and business at the New Jersey Harness Commission?

A Yes.

Q Will you tell us what the first three of them are?

A The first three are notice of suspension and fine.

Q And is there a complaint contained on the notice of suspension?

A The notice?

Q Yes or no, first?

A Yes.

Q And are the three complaints on the three notices of suspension the same?

A Yes.

MR. POLLACK: I object.

This is a direct examination limiting answers to a yes or no --

MR. CASTELLANO: Well, now, your Honor --

THE COURT: Just a moment.

MR. CASTELLANO: Excuse me.

THE COURT: If this is the face of an exhibit I will receive it as a matter of time economy.

Q If ever you want to make a further answer and I cut you short, you go ahead.

A All right.

THE COURT: On the other hand, answer responsively.

MR. CASTELLANO: Now we have it cut and dry

and I don't know where I feel cut.

Q The first three are the complaints that you made?

A Yes.

Q Who are the complainants?

A Ron Kraft, Krafthill Farm and Terry Kraft.

Q And the next three exhibits, what are they?

A Those are rulings.

Q Of the New Jersey State Harness Commission?

A Not exactly. These are rulings that are sent out to the NASRC.

Q NASRC?

A Yes.

Q What does that mean?

A National Association of Racing Commission.

Q Have you got something in your mouth?

A Yes.

Q Oh.

A I have an awful dry throat.

Q I see.

Does that suspend their license?

A Yes.

Q What was the complaint that you made against the two, Ronnie Kraft, Terry Kraft and the Krafthill Farms?

A As it was written, violation of probable hidden ownership which constitutes acts not in best interest of the sport under a New Jersey rule.

Q Hidden ownership of what?

A Horses.

Q What horses?

A Two horses in question were Kelvin Holme and Ensign Kraft.

Q Nothing to do with Adios Misty and Miltie Hanover?

A I don't know those two horses.

Q Mr.Greenberg, this is your subpoena?

A Yes.

MR. CASTELLANO: I offer in evidence these six exhibits.

THE COURT: Show them to Mr. Pollack.

Let me look at them first.

MR. CASTELLANO: Sure, Judge.

THE COURT: All right. Give them to Mr. Pollack.

MR. POLLACK: I object.

I find these totally irrelevant to the issue before the Court.

THE COURT: No, I will receive them on the

Greenberg-direct

basis they relate to the date of suspension on which Mr. David Kraft was questioned.

MR. POLLACK: None of those documents relate to David Kraft.

MR. BOBICK: May I also ask that the rule that they be received as prior similar acts committed by Krafthill Farms.

THE COURT: I have received them in evidence. I am not limiting the inferences that may be argued or should be drawn from them.

Q Mr. Greenberg, after the suspension of these, of the Farm and the two sons on September 27, 1973, did you get a call from the United States' Attorney's office, Mr. Meyerson?

A Yes.

Q Did he want you to reinstate that license?

MR. POLLACK: Objection.

THE COURT: The witness has been called by you and I think you should ask the contents of the conversation.

Q What was the content of the conversation, Mr. Greenberg?

MR. POLLACK: Objection.

THE COURT: Overruled.

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UNITED STATES OF AMERICA,

Appellee,

- against -

FORREST GERRY, JR.,

Defendant-Appellant.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF New York

SS.:

I, Eugene L. St. Louis being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at

1235 Plane Street, Union, N.J. 07083

That on the 1st day of May 19 75, deponent served the annexed

Petition
upon

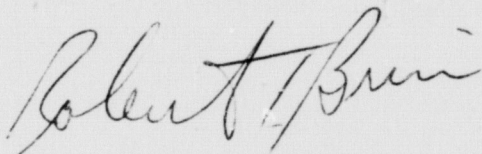
see below

attorney(s) for


in this action, at see below

the address designated by said attorney(s) for that
purpose by depositing² true copy²³ of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this 1st
day of May 19 75



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977


Print name beneath signature
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